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## **ENVIRONMENTAL PROTECTION AGENCY**

### **40 CFR Part 258**

**[EPA–R09–RCRA–2015–0445; FRL-9953-45-Region 9]**

### **Final Determination to Approve Site-Specific Flexibility for Closure and Monitoring of the Picacho Landfill**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency, Region IX, is making a final determination to approve two Site-Specific Flexibility Requests (SSFRs) from Imperial County (County or Imperial County) to close and monitor the Picacho Solid Waste Landfill (Picacho Landfill or Landfill). The Picacho Landfill is a commercial municipal solid waste landfill (MSWLF) operated by Imperial County from 1977 to the present on the Quechan Indian Tribe of the Fort Yuma Indian Reservation in California.

EPA is promulgating a site-specific rule proposed on April 7, 2016, that approves an alternative final cover and a modification to the prescribed list of groundwater detection-monitoring parameters for ongoing monitoring for the Picacho Landfill.

**DATES:** This final rule is effective on **[insert date of publication in the Federal Register]**.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. EPA–R09–RCRA–2015–0445. All documents in the docket are listed in the <http://www.regulations.gov> index. Publicly available docket materials are available electronically in <http://www.regulations.gov> and in hard copy at the EPA Library, located at the Environmental

Protection Agency, Region IX, 75 Hawthorne Street, San Francisco, California. The EPA Library is open from 9:00 a.m. to 4:00 p.m., Monday through Thursday, excluding legal holidays, and is located in a secured building. To review docket materials at the EPA Library, it is recommended that the public make an appointment by calling (415) 947-4406 during normal business hours. Copying arrangements will be made through the EPA Library and billed directly to the recipient. Copying costs may be waived depending on the total number of pages copied.

**FOR FURTHER INFORMATION CONTACT:** Steve Wall, Land Division, Mail Code LND 2-3 U.S. Environmental Protection Agency, 75 Hawthorne Street, San Francisco, CA 94105-3901; telephone number: (415) 972-3381; fax number: (415) 947-3564; e-mail address: *wall.steve@epa.gov*.

## **SUPPLEMENTARY INFORMATION:**

### **I. What did EPA propose?**

After completing a review of Imperial County's Picacho Landfill Final Closure/Post-Closure Maintenance Plan and the associated SSFRs, EPA proposed this rulemaking in the Federal Register. The proposed determination was published at 81 FR 20274, April 7, 2016. EPA proposed to approve an alternative final cover that varies from the final closure requirements of 40 CFR 258.60(a) but meets the criteria at 40 CFR 258.60(b), and alternative groundwater detection monitoring parameters for post-closure monitoring in accordance with 40 CFR 258.54(a).

### **II. Legal Authority for this Action**

Under sections 1008, 2002, 4004, and 4010 of the Resource Conservation and Recovery Act of 1976 (RCRA) as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42

U.S.C. 6901 *et seq.*, Congress required EPA to establish revised minimum federal criteria for MSWLFs, including landfill location restrictions, operating standards, design standards, and requirements for ground water monitoring, corrective action, closure and post-closure care, and financial assurance. Under RCRA section 4005, states are to develop permit programs for facilities that may receive household hazardous waste or waste from conditionally exempt small quantity generators of hazardous waste, and EPA is to determine whether the state's program is adequate to ensure that such facilities will comply with the revised federal criteria.

The MSWLF criteria are set forth in the Code of Federal Regulations at 40 CFR part 258. These regulations are prescriptive, self-implementing and apply directly to owners and operators of MSWLFs. Many of these criteria include a flexible performance standard as an alternative to the prescriptive, self-implementing regulation. The flexible standard is not self-implementing, and requires approval by the Director of an EPA-approved state MSWLF permitting program.

However, EPA's approval of a state program generally does not extend to Indian Country because states generally do not have authority over Indian Country. For this reason, owners and operators of MSWLF units located in Indian Country cannot take advantage of the flexibilities available to those facilities that are within the jurisdiction of an EPA-approved state program.

However, the EPA has the authority under sections 2002, 4004, and 4010 of RCRA to promulgate site-specific rules to enable such owners and operators to use the flexible standards.

See *Yankton Sioux Tribe v. EPA*, 950 F. Supp. 1471 (D.S.D. 1996); *Backcountry Against Dumps v. EPA*, 100 F.3d 147 (D.C. Cir. 1996). EPA refers to such rules as "Site-Specific Flexibility Determinations." EPA has developed guidance for owners and operators on preparing a request for such a site-specific rule, entitled "Site-Specific Flexibility Requests for Municipal Solid Waste Landfills in Indian Country, Draft Guidance," EPA530-R-97-016 (August 1997) (Draft

Guidance).

### **III. Background**

The Picacho Landfill is located on Quechan tribal lands on the Fort Yuma Indian Reservation approximately four miles north-northeast of the community of Winterhaven, in Imperial County, California. The Picacho Landfill is a commercial MSWLF operated by Imperial County from 1977 to the present. The landfill site is approximately 12.5 acres.

In January 2006, the Tribe requested that EPA provide comments on the County's closure plan. Between 2006 and 2011, EPA worked with the Tribe, the Bureau of Indian Affairs (BIA) and the County to develop the closure plan. During this time, EPA also reviewed the SSFRs to determine whether they met technical and regulatory requirements. On October 27, 2010, Imperial County submitted its Picacho Final Closure/Post-Closure Maintenance Plan. EPA provided a final round of comments on February 10, 2011, which Imperial County incorporated as an addendum. On April 30, 2012, the Tribe approved the Picacho Landfill Final Closure/Post-Closure Maintenance Plan as amended, and, pursuant to EPA's Draft Guidance, the Tribe forwarded to EPA two SSFRs that had been submitted by Imperial County to close and monitor the Picacho Landfill. The requests sought EPA approval to use an alternative final cover meeting the performance requirements of 40 CFR 258.60(a), and to modify the prescribed list of groundwater detection-monitoring parameters provided in 40 CFR 258.54(a)(1) and (2) for ongoing monitoring.

### **IV. Basis for Final Determination**

EPA is basing its final determination to approve the site-specific flexibility requests on the

Tribe's approval, dated April 30, 2012, EPA's independent review of the Picacho Landfill Final Closure/Post-Closure Maintenance Plan as amended, and the associated SSFRs.

A. Alternative Final Cover SSFR: Alternative Final Cover System

The regulations require the installation of a final cover system specified in 40 CFR 258.60(a), which consists of an infiltration layer with a minimum of 18 inches of compacted clay with a permeability of  $1 \times 10^{-5}$  cm/sec, covered by an erosion layer with a minimum six inches of topsoil. Imperial County sought approval for an alternative final cover designed to satisfy the performance criteria specified in 40 CFR 258.60(b); Imperial County proposed to replace this with an alternative cover consisting of two and a half feet of native soil to control infiltration covered by six inches of a soil gravel mixture to control erosion.

EPA is basing its final determination on a number of factors, including: 1) Research showing that prescriptive, self-implementing requirements for final covers, comprised of low permeability compacted clay, do not perform well in the arid west. The clay dries out and cracks, which allows increased infiltration along the cracks; 2) Research showing that in arid environments thick soil covers comprised of native soil can perform as well or better than the prescriptive cover; and 3) Imperial County's analysis demonstrates, based on site-specific climatic conditions and soil properties, that the proposed alternative soil final cover will achieve equivalent reduction in infiltration as the prescriptive cover design and that the proposed erosion layer provides equivalent protection from wind and water erosion. This analysis is provided in Appendix D and Appendix D-1 of the Picacho Landfill Final Closure/Post-Closure Maintenance Plan dated October 27, 2010 and amended by EPA's comments dated February 20, 2011.

B. Groundwater Monitoring SSFR: Alternative Detection Monitoring Parameters

The regulations require post-closure monitoring of 15 heavy metals, listed in 40 CFR part 258, Appendix I. Imperial County proposed to replace these, with the exception of arsenic, with the alternative inorganic indicator parameters chloride, nitrate as nitrogen, sulfate, and total dissolved solids.

EPA's final determination is based on the fact that the County has performed over 15 years of semi-annual groundwater monitoring at the site, and during that time arsenic was the only heavy metal detected at a value that slightly exceeded the federal maximum contaminant level (MCL), a standard used for drinking water.

## **V. Summary of Public Comments Received and Response to Comments**

EPA received one anonymous public comment during the public comment period stating support for EPA's Tentative Determination to Approve Site-Specific Flexibility for Closure and Monitoring of the Picacho Landfill, as proposed in the Federal Register on April 7, 2016.

## **VI. Additional Findings**

In order to comply with the National Historic Preservation Act, 54 U.S.C. 100101 *et seq.*, Imperial County Department of Public Works will coordinate with the Tribe to arrange for a qualified Native American monitor to be present during any work. If buried or previously unidentified resources are located during project activities, all work within the vicinity of the find will cease, and the provisions of 36 CFR 800.13(b) will be implemented. If, during the course of the Landfill closure activities, previously undocumented archaeological material or human remains are encountered, all work shall cease in the immediate area and a qualified archaeologist shall be retained to evaluate the significance of the find and recommend further

management actions.

Though no known threatened or endangered species or their habitat exist on the site, in order to ensure compliance with the Endangered Species Act, 16 U.S.C. 1536 *et seq.*, a preconstruction survey will be conducted prior to cover installation to ensure no threatened or endangered species are present. In particular, the survey will look for the presence of desert tortoises, which may occur in Imperial County. Should desert tortoises or other threatened or endangered species be encountered in the survey, or at any time during the closure of the Picacho Landfill, the County shall contact the U.S. Fish and Wildlife Service to develop avoidance measures to ensure that impacts to the species are minimized. Following closure and vegetation restoration activities, the project site may become suitable for threatened and endangered species. This would be a beneficial effect.

Under Executive Order 12866, “Regulatory Planning and Review” (58 FR 51735, October 4, 1993), this rule is not of general applicability and therefore is not a regulatory action subject to review by the Office of Management and Budget (OMB).

This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it applies to a particular facility only.

Because this rule is of particular applicability relating to a particular facility, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to sections 202, 204, and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Because this rule will affect only a particular facility, it will not significantly or uniquely

affect small governments, as specified in section 203 of UMRA.

Because this rule will affect only a particular facility, this proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, “Federalism,” (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this rule.

This rule also is not subject to Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks posed by this action present a risk to children. The basis for this belief is EPA's analysis of the potential risks posed by Imperial County's alternative final cover and alternative groundwater detection-monitoring parameters proposals and the standards set forth in this rulemaking.

This rule is not subject to Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

As required by section three of Executive Order 12988, “Civil Justice Reform,” (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal



Governments,” (65 FR 67249, November 9, 2000), calls for EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” *See also* “EPA Policy for the Administration of Environmental Programs on Indian Reservations,” (November 8, 1984) and “EPA Policy on Consultation and Coordination with Indian Tribes,” (May 4, 2011). EPA consulted with the Quechan Tribe throughout Imperial County’s development of its closure and monitoring plans for the Picacho Landfill.

#### **List of Subjects in 40 CFR Part 258**

Environmental protection, Final cover, Monitoring, Municipal landfills, Post-closure care groundwater, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

Dated: September 22, 2016.

Alexis Strauss,

Acting Regional Administrator, Region IX.

For the reasons stated in the preamble, 40 CFR part 258 is amended as follows:

#### **PART 258—CRITERIA FOR MUNICIPAL SOLID WASTE LANDFILLS**

1. The authority citation for part 258 continues to read as follows:

**Authority:** 33 U.S.C. 1345(d) and (e); 42 U.S.C. 6902(a), 6907, 6912(a), 6944, 6945(c) and

6949a(c), 6981(a).

## **Subpart F--Closure and Post-Closure Care**

2. Section 258.62 is amended by removing “[Reserved]” at the end of the section and adding paragraph (b) to read as follows:

### **§258.62 Approval of site-specific flexibility requests in Indian country.**

\* \* \* \* \*

(b) Picacho Municipal Solid Waste Landfill – alternative list of detection monitoring parameters and alternative final cover. This paragraph (b) applies to the Picacho Landfill, a Municipal Solid Waste Landfill operated by Imperial County on the Quechan Indian Tribe of the Fort Yuma Indian Reservation in California.

(1) In accordance with § 258.54(a), the owner and operator may modify the list of heavy metal detection monitoring parameters specified in appendix I of this part, as required during Post-Closure Care by § 258.61(a)(3), by replacing monitoring of the inorganic constituents, with the exception of arsenic, with the inorganic indicator parameters chloride, nitrate as nitrogen, sulfate, and total dissolved solids.

(2) In accordance with § 258.60(b), the owner and operator may replace the prescriptive final cover set forth in § 258.60(a), with an alternative final cover as follows:

(i) The owner and operator may install an evapotranspiration cover system as an alternative final cover for the 12.5 acre site.

(ii) The alternative final cover system shall be constructed to achieve an equivalent reduction in infiltration as the infiltration layer specified in § 258.60(a)(1) and (2), and provide an equivalent protection from wind and water erosion as the erosion layer specified in § 258.60(a)(3).

(iii) The final cover system shall consist of a minimum three-foot-thick multi-layer cover system comprised, from bottom to top, of:

(A) A minimum 30-inch thick infiltration layer consisting of:

(1) Existing intermediate cover; and

(2) Additional cover soil which, prior to placement, shall be wetted to optimal moisture and thoroughly mixed to near uniform condition, and the material shall then be placed in lifts with an uncompacted thickness of six to eight inches, spread evenly and compacted to 90 percent of the maximum dry density, and shall:

(i) Exhibit a grain size distribution that excludes particles in excess of three inches in diameter;

(ii) Have a minimum fines content (percent by weight passing U.S. No. 200 Sieve) of seven percent for an individual test and eight percent for the average of ten consecutive tests;

(iii) Have a grain size distribution with a minimum of five percent smaller than five microns for an individual test and six percent for the average of ten consecutive tests; and

(iv) Exhibit a maximum saturated hydraulic conductivity on the order of  $1.0E-03$  cm/sec.; and

(3) A minimum six-inch surface erosion layer comprised of a rock/soil admixture. The surface erosion layer admixture and gradations for 3% slopes and 3:1 slopes are detailed below:

(i) 3% slopes: For the 3% slopes the surface admixture shall be composed of pea gravel (3/8-inch to 1/2-inch diameter) mixed with cover soil at the ratio of 25% rock to soil by

volume with a minimum six-inch erosion layer.

(ii) For the 3:1 side slopes the surface admixture shall be composed of either: gravel/rock (3/4-inch to one-inch diameter) mixed with additional cover soil as described in paragraph (b)(2)(iii)(A)(2) of this section at the ratio of 50% rock to soil by volume and result in a minimum six-inch erosion layer, or gravel/rock (3/4-inch to two-inch diameter) mixed with additional cover soil as described in paragraph (b)(2)(iii)(A)(2) of this section at the ratio of 50% rock to soil by volume and result in a minimum 12-inch erosion layer.

(iii) The owner and operator shall place documentation demonstrating compliance with the provisions of this section in the operating record.

(iv) All other applicable provisions of this part remain in effect.

(B) [Reserved]

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